

Office of Chief Counsel
Internal Revenue Service
memorandum
CC:SB:2:GBO:GL-118069-02
SMWebster

direct line [REDACTED]

date: *Apr 15 2002*

to: Shirley M. Kreizel, Revenue Officer

thru: Steve Garwood, Group Manager

from: CC:SBSE:2:GBO

subject: **Enforcement of Tax Lien**
[REDACTED], Inc.

CDP rights of non-taxpayer
[REDACTED], Inc.

By memorandum dated March 21, 2002, you requested our views on the lien issues below.

ISSUES

1. Whether personal property of a defunct corporate taxpayer can be seized if such property has been physically transferred to the defunct corporation's corporate parent in another state?
2. Whether the parent corporation can exercise collection due process rights from a purported subsidiary that is defunct where the parent has filed a cdp appeal for its own tax collection matters approximately ten months after the service mailed the notice of intent to levy to the subsidiary?

CONCLUSIONS

1. Yes, it is appropriate to seize and sell the assets of [REDACTED] that are currently in the possession of [REDACTED] Inc.
2. No. A non-taxpayer cannot assert collection due process rights.

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FACTS

[REDACTED], Inc. ([REDACTED]) was a [REDACTED] that ceased operations in [REDACTED]. The corporation had unpaid assessed employment taxes from [REDACTED]. A notice of federal tax lien was filed on [REDACTED] in [REDACTED]. According to the IRS, there are no other known encumbrances.

Ownership of [REDACTED] There is conflicting information about the ownership of [REDACTED]. According to the tax returns of a [REDACTED] corporation, [REDACTED] Inc. ([REDACTED]), which is a [REDACTED] headquartered in [REDACTED], [REDACTED] owns [REDACTED]% of the stock of [REDACTED]. However, the attorney for [REDACTED] claims that [REDACTED] owns [REDACTED]% of the defunct corporation. Additional conflicting information is that the owners of [REDACTED], who are [REDACTED], indicated on a Form 433-B for [REDACTED] that they personally own [REDACTED]% of [REDACTED] stock.

When [REDACTED] ceased operations, its tangible personal assets were moved to the corporate headquarters for [REDACTED] in [REDACTED]. The seizable assets have an approximate fair market value of [REDACTED]. Lien notices had been filed for [REDACTED] with the [REDACTED] Secretary of State in [REDACTED], [REDACTED], and [REDACTED].

CDP for [REDACTED] On [REDACTED], a Final Notice of Intent to Levy, letter no. 1058, was sent by certified mail to [REDACTED]. No appeal or other response from [REDACTED] was received by the IRS concerning the notice. On [REDACTED], a letter 3174 was mailed to [REDACTED] to remind it that enforced collection by levy could occur.

[REDACTED] is owned by [REDACTED] and the corporation has had consistent federal employment tax delinquencies since [REDACTED]. It presently has various federal tax liabilities which total roughly \$[REDACTED]. Among other things, [REDACTED] defaulted on an installment agreement entered into in [REDACTED] and defaulted on a subordination agreement entered into in [REDACTED].

CDP for [REDACTED] On [REDACTED], the Service issued a Final Notice of Intent to Levy, letter no. 1058, to [REDACTED]. On [REDACTED], [REDACTED] filed a Request for a CDP hearing, referencing only [REDACTED] and stating in part:

[REDACTED]

As to [REDACTED], the request for a CDP hearing was timely. There was no reference to [REDACTED] in the CDP appeal by [REDACTED].

ANALYSIS

Substantive Rights. As you mentioned in your request, ownership of the stock of [REDACTED] is indeed irrelevant. In this context, the right to seize and sell the property is based on lien interests in the assets, not title to the stock. For example, an individual may hold title to a house, but if the house is subject to liens and is transferred to another party without consideration, then the house remains subject to the liens even though titled to a third party.

Here, the government has a valid perfected lien interest in the property pursuant to I.R.C. Sections 6321 and 6323. Unless [REDACTED] its owners, or any third party can establish that they (1) have a lien(s) against the property that is (2) perfected and superior to the IRS tax liens in the personal property of [REDACTED] the IRS can seize and sell the property to satisfy the liens.

The failure of a taxpayer to pay federal taxes gives rise to a general lien in favor of the United States upon "all property and rights to property" belonging to the taxpayer at the time of the assessment. 26 U.S.C. §§ 6321 and 6322. The lien attaches to all property and interests to property, wherever situated. Based on the request, there does not appear to be a competing lien interest and therefore, the statutory tax lien(s) provide an adequate basis to pursue collection.

The filing of the lien notice is pertinent to a priority question between competing creditors. Assuming that a competing lien existed, priority against a federal tax lien is governed by I.R.C. § 6323, which, *inter alia*, provides for a "first in time, first in right" rule based on the filing of the tax lien notice. If [REDACTED] or another party intends to assert a superior lien interest in the personal property, the proper way to pursue the matter would be to file a wrongful levy action after the seizure in federal district court or through the Collection Appeals Procedures.

The only difficulty with the proposed enforcement action may be identifying the assets of the defunct taxpayer, which may be intermingled with the assets of [REDACTED] and following the requisite procedures for seizing personal property at the business site of a non-taxpayer third party ([REDACTED]) that claims ownership of the property and does not consent to the seizure.

CDP rights. [REDACTED] had thirty days from [REDACTED], which was the date the notice of intent to levy was issued, to file an appeal of the proposed levy action. It failed to pursue an appeal and therefore, its appeal rights expired pursuant to Section 6330(a)(2).

Once the CDP rights expire for the periods and taxes described in the notice, the rights are forgone regardless of whether additional notices or letters are mailed to the taxpayer. Treas. Reg. §301.6330-1(b)(2)(Q-B2, A-B2; Q-B4, A-B4). Therefore, the [REDACTED] (reminder) letter to [REDACTED] had no effect on the expired appeal rights of the corporation for the periods and tax set forth in the [REDACTED] notice. The "reminder" letter is mentioned in the Treasury regulation:

The IRS generally provides additional notices or reminders (reminder notifications) to the taxpayer of its intent to levy when no collection action has occurred within 180 days of a proposed levy. Under such circumstances, a taxpayer may request an

equivalent hearing as described in paragraph (i) of this section. Treas. Reg. § 301.6330-1(b)(2)(Q-B2, A-B2).

The issuance of "reminder" letters is merely a practice if no other collection activity has occurred within the preceding six months and the Service is continuing with enforced collection. The IRM states that:

If a notice of intent to levy is over 180 days old, it is legally valid to support subsequent collection action by levy. However, it has been administratively determined that the taxpayer will get a new warning of enforcement action before a notice of levy is issued.

Therefore, it appears that neither the existence of, nor the absence of, "reminder" letters create affirmative rights for the taxpayer or limit the Service's enforcement rights. It appears that the purpose of the reminder letters is that where there has not been any enforced collection for a period of more than six months, the agency should issue a reminder if future enforced collection is contemplated.

As to whether [REDACTED] can assert appeal rights for a defunct subsidiary, Section 6330 provides appeal rights to the taxpayer, which is described in Section 6331(a). This does not include third parties, such as nominees, or persons in the possession of the property. Further, Treasury Regulation 301.6330-1(a)(3)), provides the following with respect to the rights of third parties:

Q-B5. Will the IRS give pre-levy or post-levy CDP Notices to known nominees of, persons holding property of, or persons holding property subject to a lien with respect to the taxpayer?

A-B5. No. Such person is not the person described in section 6331(a) and is, therefore, not entitled to a CDP hearing or an equivalent hearing (as discussed in paragraph (i) of this section). Such person, however, may seek reconsideration by the IRS office collecting the tax, assistance from the National Taxpayer Advocate, or an administrative hearing before Appeals under its Collection Appeals Program. However, any such administrative hearing would not be a CDP hearing under section 6330 and any determination or decision resulting from the hearing would not be subject to judicial review.

(3) Example. The following example illustrates the principles of this paragraph (b):

Example. Federal income tax liability for 1997 is assessed against individual D. D buys an asset and puts it in individual E's name. The IRS gives D a CDP Notice of intent to levy with respect to the 1997 tax liability. The IRS will not notify E of its intent to levy. The IRS is not required to notify E of its intent to levy although E holds property of individual D. E is not the taxpayer.

Even assuming [REDACTED] could exercise the rights of its purported subsidiary, the appeal that was pursued by [REDACTED] for its own tax liabilities was untimely with respect to [REDACTED] because [REDACTED] filed its request for hearing more than nine months after the notice of intent to levy was served on [REDACTED]. Further, the appeal pursued by [REDACTED] did not raise any issues pertaining to [REDACTED].

If you learn of additional information that could change the foregoing analysis, please advise us so that it can be considered. I can be reached at [REDACTED].

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Senior Attorney (SBSE)